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Nos. 04-805 and 04-814

IN THE

Supreme Court of the United States

TEXACO, INC.,

Petitioner,

v.

FOUAD N. DAGHER, *et al.*,

Respondents.

SHELL OIL COMPANY,

Petitioner,

v.

FOUAD N. DAGHER, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RETAIL INDUSTRY LEADERS ASSOCIATION AND THE FOOD MARKETING INSTITUTE AS *AMICI CURIAE* SUPPORTING RESPONDENTS

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BRIEF OF *AMICI CURIAE* SUPPORTING RESPONDENTS

INTEREST OF *AMICI*

Amici, The Retail Industry Leaders Association ("RILA") and The Food Marketing Institute ("FMI"), are trade associations that collectively represent thousands of merchants. RILA and FMI members collaborate in pro-competitive joint ventures and purchase products and services from joint ventures, including credit, debit and commercial card services from the Visa and MasterCard joint ventures.[1]

RILA is the world's leading alliance of fastest-growing and innovative retailers and their product and service suppliers. RILA members represent more than $1 trillion in sales annually and operate more than 100,000 stores, manufacturing facilities and distribution centers nationwide. Its member retailers and suppliers have facilities in all 50 states, and they employ millions of Americans.

FMI conducts programs in research, education, industry relations and public affairs on behalf of its 1,500 member companies — supermarkets and grocery wholesalers — in the United States and around the world. FMI's U.S. members operate approximately 26,000 grocery stores in the United States. FMI's membership ranges from small, independent supermarkets to mid-sized regional firms to large supermarket chains.

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1. This brief was prepared in its entirety by *amici curiae* and their counsel. No monetary contribution to the preparation or submission of this brief was made by any person or entity other than *amici*. Petitioners and respondents have consented to the filing of this brief by the accompanying letters filed with the Clerk.

RILA and FMI have significant and unique interests in this case. Their members have benefited from the antitrust laws' solicitude towards procompetitive joint ventures by entering into such collaborations. And their members and customers have experienced firsthand how joint ventures can be exploited for anticompetitive purposes. For this reason, RILA and FMI have a strong interest in maintaining the proper balance between enforcing the antitrust laws and encouraging procompetitive joint ventures, while at the same using Section 1 of the Sherman Act, 15 U.S.C. § 1, to protect against their exploitation for anticompetitive purposes.

RILA and FMI's interest in this action has been heightened by the fact that Visa (along with The Coca-Cola Company and Microsoft Corporation) has submitted a brief, as *amicus*, advocating the extension of the single-entity doctrine to post-formation joint venture conduct. Visa is advocating this position to immunize from Section 1 challenge its practice of collectively fixing with Visa owner/member banks the interchange prices that they charge for every Visa credit, debit and commercial card transaction in the United States. Visa acknowledges in footnote 9 of its brief that this issue was not raised in this appeal. RILA and FMI members and their customers, which must accept Visa and MasterCard's dominant payment cards to remain competitive, are forced to pay these fixed and supra-competitive fees on every Visa (and MasterCard) credit, debit and commercial card transaction that they accept.

Merchants have filed antitrust lawsuits to address this abuse of Visa and MasterCard's substantial market power. At least 39 actions,[2] many of which are putative class actions,

2. These actions include *Kendall d/b/a Bala Hair Salon v. Visa U.S.A. Inc.*, No. 04-CV-4276 (JSW) (N.D. Cal. filed Oct. 8, 2004 and dismissed on July 25, 2005 without leave to amend) (class action (Cont'd)

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complaint); *Animal Land, Inc. v. Visa U.S.A. Inc.*, No. 05-CV-1210 (N.D. Ga. filed May 6, 2005) (class action complaint); *Photos Etc. Corp. v. Visa U.S.A. Inc.*, No. 305-CV-1007 (RNC) (D. Conn. filed June 22, 2005) (class action complaint); *NuCity Publications, Inc. v. Visa U.S.A. Inc.*, No. 05-CV-5991 (S.D.N.Y. filed June 28, 2005) (class action complaint); *Fairmont Orthopedics & Sports Medicine, PA. v. Visa U.S.A. Inc.*, No. 05-CV-6259 (S.D.N.Y. filed July 8, 2005) (class action complaint); *Parkway Corp. v. Visa U.S.A. Inc.*, No. 05-CV-6349 (S.D.N.Y. filed July 12, 2005) (class action complaint); *Tabu Salon & Spa, Inc. v. Visa U.S.A. Inc.*, No. 05-CV-1111 (D.Conn. filed July 13, 2005) (class action complaint); *The Kroger Co. v. Visa U.S.A. Inc.*, No. 05CV-6409 (S.D.N.Y. filed July 14, 2005); *Rookies, Inc. v. Visa U.S.A. Inc.*, No. C-05-2933 (N.D. Cal. filed July 19, 2005) (class action complaint); *Broken Ground, Inc. v. Visa U.S.A. Inc.*, No. 05-CV-6543 (S.D.N.Y. filed July 19, 2005) (class action complaint); *Baltimore Avenue Foods, LLC. v. Visa U.S.A. Inc.*, No. 05-CV-6532 (S.D.N.Y. filed July 19, 2005) (class action complaint); *East Goshen Pharmacy, Inc. d/b/a Optioncare of Chester County v. Visa U.S.A. Inc.*, No. 05-CV-1177 (D.Conn. filed July 22, 2005) (class action complaint); *Randall Jasperson d/b/a Jasperson Sod Service v. Visa U.S.A. Inc.*, No. C-05-2996 (N.D. Cal. filed July 22, 2005) (class action complaint); *Lakeshore Interiors v. Visa U.S.A.*, No. 05-CV-6683 (S.D.N.Y. filed July 26, 2005) (class action complaint); *Bonte Wafflerie LLC. v. Visa U.S.A.*, No. 05-CV-6708 (S.D.N.Y. filed July 26, 2005) (class action complaint); *Abdallah Bishara d/b/a Uncle Abe's Phillip 66 v. Visa U.S.A. Inc.*, No. 05-CV-4147 (E.D. Pa. filed Aug. 3, 2005) (class action complaint); *Lombardo Bros., Inc. v. Visa U.S.A. Inc.*, No. 05-CV-4146 (E.D. Pa. filed Aug. 3, 2005) (class action complaint); *518 Restaurant Corp. v. American Express Travel Related Servs. Co.*, No. 05-CV-4230 (E.D. Pa. filed Aug. 9, 2005) (class action complaint); *Jennifer Lee Photography v. Visa U.S.A. Inc.*, No. CV-05-3800 (E.D.N.Y. filed Aug. 10, 2005) (class action complaint); *Discount Optics, Inc. v. Visa U.S.A. Inc.*, No. 05-CV-7175 (S.D.N.Y. filed Aug. 12, 2005) (class action complaint); *Hy-Vee, Inc. v. Visa U.S.A. Inc.*, No. CV-05-3925 (E.D.N.Y. filed Aug. 16, 2005); *Resnick Amsterdam & Leshner P.C. v. Visa U.S.A. Inc.*, No. CV-05-3924 (E.D.N.Y. filed Aug. 16, 2005) (class action

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assert Sherman Act Section 1 causes of action that challenge Visa/MasterCard interchange prices.[3] Certain FMI members are serving as named plaintiffs in some of these cases;

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complaint); *Leeber Cohen MD v. Visa U.S.A. Inc.*, No. 05-CV-7317 (S.D.N.Y. filed Aug. 18, 2005) (class action complaint); *LDC, Inc. v. Visa U.S.A., Inc.*, No. 05-CV-7316 (S.D.N.Y. filed Aug. 18, 2005) (class action complaint); *G.E.S. Bakery, Inc. d/b/a Strauss Bakery v. Visa U.S.A. Inc.*, No. 05-CV-7414 (S.D.N.Y. filed Aug. 22, 2005) (class action complaint); *Connecticut Food Ass'n v. Visa U.S.A. Inc.*, No. 05-CIV-7456 (S.D.N.Y. filed Aug. 23, 2005) (class action complaint); *Hyman v. Visa Int'l Service Ass'n*, No. 05-CV-487-S (W.D.K.Y. filed Aug. 25, 2005) (class action complaint); *Meijer, Inc. v. Visa U.S.A. Inc.*, No. CV-05-4131 (E.D.N.Y. filed Aug. 29, 2005); *The Kroger Co. v. MasterCard Incorporated*, No. 05-CV-6913-DAB (S.D.N.Y. filed Aug. 31, 2005); *Fringe, Inc. v. Visa U.S.A. Inc.*, No. CV-05-4194 (E.D.N.Y. filed Sept. 2, 2005) (class action complaint); *Jax Dux & Bux, LLC v. Visa U.S.A. Inc.*, No. 05-CV-8058 (S.D.N.Y. filed Sept. 16, 2005) (class action complaint); *Michael Cetta, Inc. d/b/a Sparks Steak House v. Visa U.S.A. Inc.*, No. 05-CV-8060 (S.D.N.Y. filed Sept. 16, 2005) (class action complaint); *47 West 55th Rest. Inc. d/b/a Giovanni Ristorante v. Visa U.S.A. Inc.*, No. 05-CV-8057 (S.D.N.Y. filed Sept. 16, 2006) (class action complaint); *National Ass'n of Convenience Stores v. Visa U.S.A. Inc.*, No. CV-05-4521 (E.D.N.Y. filed Sept. 22, 2005) (class action complaint); *Jetro Holdings, Inc. v. Visa U.S.A. Inc.*, No. CV-05-4520 (E.D.N.Y. filed Sept. 23, 2005) (class action complaint); *Supervalu Inc. v. Visa U.S.A. Inc.*, No. CV-05-4650 (E.D.N.Y. filed Sept. 30, 2005); *Publix Super Markets, Inc. v. Visa U.S.A. Inc.*, No. CV-05-4677 (E.D.N.Y. filed Oct. 4, 2005); *Seaway Gas & Petroleum, Inc. v. Visa U.S.A. Inc.*, No. 05-CV-4728 (E.D.N.Y. filed Oct. 6, 2005) (class action complaint); and *Raley's v. Visa U.S.A. Inc.*, No. 05-CV-4799 (E.D.N.Y. filed Oct. 12, 2005).

3. A class of all merchants accepting Visa and MasterCard credit card transactions for payment has previously been certified. *See In re Visa Check/MasterMoney Antitrust Litig.*, 192 F.R.D. 68 (E.D.N.Y. 2000), *aff'd*, 280 F.3d 124 (2d Cir 2001), *and cert. denied*, 536 U.S. 917 (2002).

numerous FMI and RILA members also are members of the putative classes.[4]

RILA and FMI submit this brief to advocate that Section 1 of the Sherman Act is, and must remain, applicable to the pricing activities of joint ventures whether or not those activities are engaged in after the initiation of the venture. Any other result would be inconsistent with Congressional intent, precedent and sound antitrust policy.

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4. While these cases are pending, it should be noted that foreign regulators have taken steps against the fixing of interchange by the Visa and MasterCard joint ventures outside the United States. *See, e.g.*, Office of Fair Trading, *MasterCard Interchange Fees Preliminary Conclusions*, OFT634 (Feb. 11, 2003), *at* www.oft.gov.uk/ NR/rdonlyres/9F26CE17-08E2-4680-8F4F-56A24980F8B9/0/oft634.pdf (setting forth the OFT's preliminary finding that MasterCard's interchange fees violated UK competition laws); Office of Fair Trading, *OFT Issues Statement of Objections on Visa Agreement*, Press Release 195/05 (Oct. 19, 2005), *at* http://www.oft.gov.uk/News/ Press+releases/2005/195-05.htm ("The OFT is of the view that the collective agreement between Visa and its member backs on the interchange fee charged between card issuing banks and merchant acquirers, on Visa card transactions taking place in the UK, restricts competition. . . ."); Reserve Bank of Australia, *Reform of Credit Card Schemes in Australia IV, Final Reforms and Regulation Impact Statement*, August 2002, at 31, *at* http://www.rba.gov.au/PaymentsSystem/Reforms/CCSchemes/FinalReforms/index.html ("The Reserve Bank does not accept that interchange fees are collectively set in Australia under strong competitive conditions."). Other foreign antitrust authorities are also evaluating Visa/MasterCard interchange setting. *See, e.g.*, Stuart E. Weiner & Julian Wright, *Interchange Fees in Various Countries: Developments and Determinants*, June 17, 2005 at 2, *at* http://www.kc.frb.org/FRFS/PSR/PDF/WeinerWrightFinal061705.pdf (citing current scrutiny over interchange fees in the European Union, the Netherlands, Mexico and Spain).

SUMMARY OF ARGUMENT

1. Since the advent of the antitrust laws, Section 1 of the Sherman Act, 15 U.S.C. § 1, has protected consumers against the exploitation of joint ventures to subvert competition. In applying Section 1 to joint venture conduct, neither this Court nor Congress granted joint ventures special status or any kind of immunity from antitrust treatment. Where joint ventures impose restraints on price or output, that are not ancillary to or reasonably necessary for their functioning, they have been declared illegal. *See Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 598 (1951), *overruled on other grounds by Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984). Where restraints on price are in fact necessary to the joint venture's legitimate purposes, such as when they are ancillary to the creation of a product that the participants could not have created on their own, they have been found lawful. *See Broadcast Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1 (1979). These principles are well-settled, and scores of procompetitive joint ventures have thrived against their backdrop.

In *Dagher*, the Ninth Circuit was faced with an efficiency-enhancing joint venture and respondents' claim that the agreement to align Texaco and Shell's pricing in the relevant market was a naked restraint of trade. It correctly asked whether the restraint was reasonably necessary to the venture's legitimate purposes. The question on this appeal, therefore, is not whether the Ninth Circuit erred in applying the ancillary restraints doctrine but rather whether it erred in the outcome of its ancillary restraints analysis. As such, nothing in the Ninth Circuit's decision suggests that any change in the antitrust laws' treatment of joint ventures is warranted.

2. Petitioners and Visa, by contrast, suggest that this case shows why *Copperweld* should be extended to joint ventures. Texaco, for example, contends that Section 1 should not have been applied because, once formed, the joint venture "eliminated all competition between [the participants] in the relevant market." Texaco Br. at 8.[5] Shell, for its part, asserts that because "the partners are merging all of their relevant business activities and therefore do not compete with the venture," Section 1 should not apply. Shell Br. at 9. Certain *amici* parrot this rationale: "once formed, the joint venture participants no longer are in competition with respect to matters within the scope of the venture," and the single entity doctrine should immunize the venture from Section 1. Visa Br. at 3.

While petitioners and their supporters wrap their argument in *Copperweld*, that decision does not support their attempt to rewrite the antitrust treatment of joint ventures. *Copperweld's* teaching shows why Section 1's application to this case should be beyond question. After this venture was formed, Texaco and Shell did not have the "complete unity of interest" which was central to *Copperweld's* finding that parents and their wholly owned subsidiaries cannot conspire. Texaco and Shell chose to form a joint venture (and not merge), because they continued to compete in other markets and wanted to preserve the flexibility to resume competition in the relevant market.

The petitioners contend that they had the requisite unity of interest because the venture ended all competition between

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5. References to "Texaco Br." are to Texaco's brief on the merits, to "Shell Br." are to Shell's brief on the merits, and to "Dagher Br." are to respondents' brief on the merits. References to "Visa Br." are to *amici* Visa, Coca-Cola and Microsoft's brief in support of petitioners, and to "Gov't Br." are to *amicus* United States' brief in support of petitioners. References to "Pet. App." are to the appendix filed with Texaco's petition for a writ of *certiorari*.

them in the relevant market. Even if that were true — and the record supports the conclusion that the oil companies, at most, suspended competition in the relevant market — that fact would not end the inquiry. As the United States acknowledged in its brief, an agreement regarding the pricing of a joint venture's products can affect competition between the participants outside the joint venture. Gov't Br. at 15 n.9. In fact, there is evidence of that occurring here; aligning the pricing of Texaco and Shell's products inside the joint venture may have facilitated the alignment of their aviation fuel prices outside the joint venture. Dagher Br. at 32-33. If Section 1 does not reach such pricing decisions, an arrangement that facilitates price-fixing in related markets would escape scrutiny. Nothing in *Copperweld* or this Court's numerous precedents regarding joint ventures' conduct would support such an extreme result.

3. Congress has never evinced an intent to relieve joint ventures from Section 1 scrutiny. Indeed, the enactment of the Standard Setting Development Organization Act of 2004, which recently reaffirmed that procompetitive standard setting joint ventures are subject to Section 1 rule of reason treatment, demonstrates Congress' reluctance to confer antitrust immunity on joint ventures.

4. Using this case to create a broad rule that immunizes restraints on conduct "within the joint venture" from Section 1 scrutiny post-formation would create a potentially dangerous and unprecedented safe harbor for joint venture conduct. Such *per se* immunity from Section 1 is precisely the type of formalistic line-drawing that petitioners and certain *amici* claim to abhor. More importantly, such a rule would offend the core antitrust precept that *per se* rules should be applied only to restraints that have highly predictable effects. Given that joint ventures come in many shapes and sizes, each with very different claimed efficiencies

and potential anticompetitive effects, there is no justification for a broad joint venture safe harbor from any potential Section 1 liability. Like all agreements that do not have predictable effects, joint ventures should be evaluated on a case-by-case basis, with an "enquiry meet for the case, looking to the circumstances, details, and logic of a restraint." *California Dental Ass'n v. FTC*, 526 U.S. 756, 781 (1999).

5. This Court granted *certiorari* to address the following question presented: "whether it is *per se* illegal concerted action under Section 1 of the Sherman Act for an economically integrated joint venture to set the selling price of its own products." *See Texaco Inc. v. Dagher*, No. 04-805, Vide 04-814, Questions Presented, *at* http://www.supremecourtus.gov/qp/ 04-00805qp.pdf. The question here is not whether *Copperweld* should be extended to joint ventures. Nor is it whether joint ventures should be given special immunity from Section 1 post-formation. Although the answers to those questions should be an unequivocal no, those issues are not raised on these facts, and therefore they should not be decided on this appeal. This conclusion is reinforced by the fact that the petitioners did not even raise their *Copperweld* argument in the court of appeals. Dagher Br. at 15, 22. For these reasons, this case is well-suited to the axiom, recently articulated by the Chief Justice, that "if it is not necessary to decide more, it is necessary not to decide more." *PDK Labs. Inc. v. United States Drug Enforcement Admin.*, 362 F.3d 786, 799 (D.C. Cir. 2004).

ARGUMENT

I. SECTION 1 PROPERLY APPLIES TO JOINT VENTURES

This Court has consistently applied Section 1 to joint venture conduct. *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447 (1986); *NCAA v. Board of Regents of Univ. of Okla.*, 468 U.S. 85 (1984); *Arizona v. Maricopa County Med. Soc'y*, 457 U.S. 332 (1982); *Broadcast Music*, 441 U.S. 1; *United States v. Topco Assocs., Inc.*, 405 U.S. 596 (1972); *Citizen Publ'g Co. v. United States*, 394 U.S. 131, 134 (1969) (joint venture that "end[ed] any business or commercial competition between the" participating newspapers subject to Section 1); *United States v. Sealy, Inc.*, 388 U.S. 350 (1967); *Timken*, 341 U.S. 593; *Associated Press v. United States*, 326 U.S. 1, 15 (1945) (holding that "[t]he Sherman Act was specifically intended to prohibit independent businesses from becoming 'associates' in a common plan which is bound to reduce their competitor's opportunity to buy or sell the things in which the groups compete").

Professor Hovenkamp described the rationale for subjecting joint ventures to Section 1 treatment as follows:

> [J]oint ventures are analyzed under the "restraint of trade" standard rather than the monopoly standard. The restraint-of-trade standard condemns agreements that threaten marketwide output reductions, whether or not anyone is excluded. While antitrust tribunals should be loath to turn single firms into price-regulated utilities, they can and do review and disapprove agreements in restraint of trade. Thus, in the presence of market power firms acting in concert are *not* permitted to reduce aggregate

> output to a level lower than the competitive one, to raise prices higher than the competitive level, or to restrain innovation by agreeing to produce less than the competitive amount. As a result, we differ from those who would treat separate profit-maximizing entities as a single firm when the firms are organized into a joint venture. To be sure, such ventures yield joint provision of some inputs as well as output, but that does not set aside the fact that any threatened output reduction is the product of agreement rather than unilateral conduct.

See XIII Herbert Hovenkamp, *Antitrust Law*, ¶ 2101 (2005).

For these reasons, this Court has expressly declined to give joint ventures special status under the antitrust laws. This was articulated by the Court over fifty years ago in *Timken*, 341 U.S. at 598:

> Nor do we find any support in reason or authority for the proposition that agreements between legally separate persons and companies to suppress competition among themselves and others can be justified by labeling the project a "joint venture." Perhaps every agreement and combination to restrain trade could be so labeled.

See also NCAA, 468 U.S. at 113 ("joint ventures have no immunity from the antitrust laws."); *In the Matter of Brunswick Corp.*, 94 FTC 1174, 1266 (1979) ("A price-fixing scheme or other cartel[-]like behavior cannot be insulated from review simply by fixing the 'joint venture' label to a device used to engage in behavior inherently pernicious to competition"), *modified*, 96 FTC 151 (1980), *aff'd sub nom., Yamaha Motor Co. v. FTC*, 657 F.2d 971 (8th Cir. 1981), *and cert. denied*, 456 U.S. 915 (1982).

Accordingly, restraints on price or output that are not reasonably necessary to a joint venture's legitimate efficiency-enhancing purposes will be condemned. Such restraints pass antitrust muster, however, when they are reasonably necessary to the claimed efficiencies, such as when they underpin the creation of products that the venturers could not produce on their own. *See Broadcast Music*, 441 U.S. at 20-23. The ancillary restraints doctrine is thus critical to this framework, as it gives courts the ability to distinguish joint ventures (or joint venture restraints) that merely facilitate the exercise of market power from those that advance consumer welfare. Naked restraints make sense only because they enable the exercise of market power. By contrast, "a truly ancillary restraint is profitable irrespective of market control." XIII Herbert Hovenkamp, *Antitrust Law*, ¶ 2100b (2005). Applying these principles, if a joint venture restraint plausibly threatens to reduce marketwide output and increase prices, a court must examine whether the defendants can show ancillarity, "that is, that the restraint is profitable without regard to any market power or control held by the firms." *Id.* at ¶ 2100g. If defendants can make that showing, a full-blown rule of reason analysis must be applied. If they cannot, *per se* or quick look condemnation is appropriate.[6]

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6. This approach was recently described as follows:

> Once a court finds the joint venture proper, it can easily determine the appropriateness of any related competitive restraints among the parties to the venture. A court should simply consider whether such restraints are necessary to promote the venture's procompetitive purposes. If a joint venture itself is procompetitive, the courts should uphold any restrictions on competition necessary to achieve its legitimate purposes. . . . The defendant should have the burden of proving that a competitive restraint is required to further a venture's efficiency objectives. If a defendant fails to meet this

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Faced with a summary judgment motion where the court was required to give respondents' evidence of anticompetitive effects all permissible inferences, the Ninth Circuit properly asked whether defendants could show that the restraint in question was reasonably necessary to achieve the venture's legitimate purpose. Nothing in this case warrants the slightest amendment to the well-settled antitrust framework for joint ventures, let alone the extreme changes advocated by petitioners and certain *amici*.

II. *COPPERWELD* SHOULD NOT BE EXTENDED TO JOINT VENTURE CONDUCT

Petitioners and certain *amici* seek to reverse the longstanding jurisprudence applying Section 1 to prohibit unreasonable restraints of trade enacted by joint ventures. Shell argues that "because the formation of [a fully integrated] joint venture will itself eliminate all relevant competition between the partners, a decision about the operation of the venture, once formed, cannot further restrict competition and is therefore not a proper subject of Section 1 inquiry." Shell Br. at. 14. Texaco contends that because Equilon purportedly "was a complete merger of the relevant businesses of the companies involved," it should be immune from Section 1 post-formation. Texaco Br. at 13. Visa and its co-*amici*, Coca-Cola and Microsoft, go even further: they argue that Section 1 is inapplicable to joint venture conduct post-formation because the antitrust laws permit owners of

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> burden, a court should preclude the restraint without any further inquiry.

Thomas A. Piraino, Jr., *A Proposed Antitrust Approach to Collaborations Among Competitors*, 86 Iowa L. Rev. 1137, 1188-89 (2001). We see no reason to limit the ancillary restraints doctrine in the manner advocated by the petitioners and various *amici*.

"the venture to agree to eliminate competition that otherwise would exist between [them] in order to make their cooperation efficient." Visa Br. at 13.

These arguments depend on a misreading of *Copperweld* and a distorted characterization of the facts of this case. If anything, applying *Copperweld* to this case shows why Section 1 presumptively should apply to joint venture conduct post-formation.

Copperweld held that the coordinated conduct of a parent corporation and its wholly owned subsidiary could not comprise a conspiracy cognizable under Section 1. 467 U.S. at 771. The Court reasoned that because a "parent and its wholly owned subsidiary have a complete unity of interest," when they "'agree' to a course of action, there is no sudden joining of economic resources that had previously served different interests." *Id.* As a result, the Court found that the rationale for Section 1 scrutiny — the prevention of concerted action that "deprives the marketplace of the independent centers of decisionmaking that competition assumes and demands" (*id.* at 769) — simply does not apply to intra-corporate conduct. Decisions following *Copperweld* merely extended this reasoning to other corporate forms in which decentralization of a single corporation could manifest itself, such as the joint conduct of two subsidiaries wholly owned by one corporation.[7]

Nothing in *Copperweld* or its progeny supports its extension to joint venture conduct. In fact, *Copperweld* was specifically limited "to the narrow issue squarely presented: whether a parent and its wholly owned subsidiary are capable of conspiring in

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7. *See, e.g., Eichorn v. AT&T Corp.*, 258 F.3d 131, 138 (3d Cir.), *cert. denied*, 534 U.S. 1014 (2001); *Advanced Health-Care Servs., Inc. v. Radford Cmty. Hosp.*, 910 F.2d 139, 146 (4th Cir. 1990); *Directory Sales Mgmt. Corp. v. Ohio Bell Tel. Co.*, 833 F.2d 606, 611 (6th Cir. 1987); *Hood v. Tenneco Tex. Life Ins. Co.*, 739 F.2d 1012, 1015 (5th Cir. 1984).

violation of § 1 of the Sherman Act." 467 U.S. at 767. There is no sound antitrust policy rationale for extending *Copperweld*'s reasoning to joint venture conduct. In determining whether *Copperweld* immunizes coordinated conduct from Section 1 scrutiny, the critical inquiry is whether the alleged conspirators have pursued interests "which tend to show that any two of the defendants are, or have been, actual or potential competitors."[8] As Professor Areeda noted, "the most significant competitive threats arise when joint venture participants are actual or potential competitors," because such competitors "generally remain as important and independent market actors, often in competition with one another with respect to non-venture business." VII Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law*, ¶¶ 1478a, 1478b2 (2d ed. 2003). Accordingly, lower courts have consistently applied Section 1 to collaborations between actual and/or potential competitors.[9]

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8. *City of Mt. Pleasant, Iowa v. Associated Elec. Coop., Inc.*, 838 F.2d 268, 276 (8th Cir. 1988). *See also Jack Russell Terrier Network of Northern Cal. v. American Kennel Club, Inc.*, 407 F.3d 1027, 1034 (9th Cir. 2005) ("The crucial question is whether the entities alleged to have conspired maintain an 'economic unity,' and whether the entities were either actual or potential competitors.").

9. *See Sullivan v. National Football League*, 34 F.3d 1091, 1099 (1st Cir. 1994) (application of *Copperweld* to football league denied because NFL member clubs pursued diverse interests by competing in "several ways off the field"); *Freeman v. San Diego Ass'n of Realtors*, 322 F.3d 1133, 1148-49 (9th Cir.), *cert. denied*, 540 U.S. 940 (2003) (summary judgment for defendants reversed because defendants' joint venture not shielded from Section 1 liability under single-entity rule when defendants were both potential and actual competitors); *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 215 (D.C. Cir. 1986) (Section 1 applied to decision of van line because all but two of the directors were actual or potential competitors, "and that is also sufficient to take this case out of the *Copperweld* rule."); *Fraser v. Major League Soccer, L.L.C.*, 284 F.3d 47, 57 (1st Cir. 2002) (Section 1 applied to league conduct "where, as here, the stockholders are themselves potential competitors with [the joint venture] and with each other.").

Here, Shell and Texaco did not fully integrate their operations. They continued to compete in other markets and remained potential competitors in the relevant market. They continued to compete in geographic markets outside the United States, in the upstream exploration and production of crude oil, and in the sale of marine and jet fuel in the United States. *See* Pet. App. at 5a, 56a. To preserve their ability to compete in other markets and potentially resume competition in the relevant market, Texaco and Shell retained ownership and control over their trademarks, licensed the right to use them to the joint venture, and entered into a "Brand Management Protocol" that required it to refrain from preferring one brand over the other. *Id.* at 5a, 58a. The only possible rationale for that arrangement was the parties' desire to protect their respective brands, given their continuing competition in other markets and the very real possibility that they might resume competition in the relevant market in the foreseeable future. Finally, the agreement permitted the dissolution of the joint venture at any time upon mutual consent, and notably, it was dissolved after only three years.

Because petitioners continued to compete in related markets (and remained potential competitors in the relevant market), the fact that the restraint related to the pricing of the venture's products should not immunize it from Section 1 scrutiny.[10] As this case shows, agreements regarding the pricing of a joint venture's products can affect competition between the participants outside the joint venture. Gov't Br. at 15 n.9. Respondents have proffered evidence that aligning the pricing

10. Notably, this case can be contrasted with the facts in *Broadcast Music*, 441 U.S. at 20-23, where this Court declined to apply the *per se* rule to a pricing restraint that underpinned the creation of a new product, the blanket license, which the individual composers could not produce on their own. Here, the joint venture did not produce any new products, and the petitioners failed to make a showing that the pricing restraint was reasonably necessary to achieve the cost savings that the joint venture was designed to foster.

of Texaco and Shell's products inside the joint venture facilitated the coordination of their aviation fuel prices outside the joint venture. Dagher Br. at 32-33. If Section 1 does not reach a restraint on pricing merely because it concerned the venture's products, an arrangement that facilitates price-fixing in related markets would escape scrutiny.

In sum, given that Texaco and Shell did not fully integrate their operations, the petitioners lacked the "complete unity of interest" demanded by *Copperweld*.[11] As actual and potential competitors, petitioners were clearly in a position to use Equilon to "deprive[] the marketplace of the independent centers of decisionmaking that competition assumes and demands." *Copperweld*, 467 U.S. at 769. Section 1's application to this venture should be beyond question.

III. CONGRESSIONAL INTENT DEMONSTRATES THAT JOINT VENTURES SHOULD BE SCRUTINIZED UNDER SECTION 1

Congress has never enacted legislation absolving joint ventures from Section 1 scrutiny. Indeed, Congress declined to do that even in passing legislation with respect to joint ventures that are presumed to be efficiency-enhancing. In those instances, Congress has instead mandated that the

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11. Petitioners' reliance on *dicta* from this Court's decision in *Maricopa County* is misplaced. Specifically, *Maricopa County* observed that "joint arrangements in which persons who would otherwise be competitors pool their capital and share the risks of loss as well as the opportunities for profit" should be treated as a single entity. 457 U.S. at 356. Because Texaco and Shell merely suspended competition in the relevant market and continued to compete in other markets, *dicta* regarding a complete integration where the partners "would otherwise be competitors" is plainly inapposite to this case.

conduct of such procompetitive joint ventures be adjudged under the rule of reason.

Just last year, Congress passed the Standards Development Organization Advancement Act of 2004 ("SDOAA"), Pub. L. No. 108-237, 118 Stat. 661, which amended the National Cooperative Research Act of 1984 ("NCRA"), *amended as* National Cooperative Research and Production Act of 1993, 15 U.S.C. § 4301 *et seq.* *See* H.R. Conf. Rep. No. 98-1044, *reprinted in* 1984 U.S.C.C.A.N. 3131, 3132 (1984) (NCRA legislative shows Congress' refusal to immunize "classic cartel-like behavior by participants in a joint R&D venture" from Section 1 scrutiny). As a result, research and development joint ventures and standard development organizations, which make appropriate filings with the antitrust agencies, shall be scrutinized under the rule of reason. 15 U.S.C. § 4302. Congress could have immunized these organizations from all Section 1 scrutiny post-formation, but chose not to. Accordingly, Congressional intent demonstrates that the result urged by petitioners and supporting *amici* — immunity from Section 1 post-formation — is disfavored.

IV. EXTENDING THE SINGLE ENTITY DOCTRINE TO JOINT VENTURES WOULD CREATE AN UNWARRANTED SAFE HARBOR FOR MOST JOINT VENTURE RESTRAINTS

If *Copperweld* is contorted to apply to this case, then the antitrust laws would give joint ventures a virtually-complete safe harbor from Section 1 scrutiny post-formation. Visa and its co-*amici*, for example, contend that joint ventures "in which the participants agree to eliminate all competition between themselves and between themselves and the venture" should be treated as a single entity after formation. Visa Br. at 3. Even if that overbroad safe harbor made sense from an

antitrust policy perspective — which it does not — its factual premises bear no relationship to this case. Given that petitioners did not eliminate all competition between themselves, there is no need to reach this argument on this appeal.

In any event, this proposed safe harbor cannot be reconciled with precedent and sound antitrust policy.[12] Because most joint ventures are not scrutinized by antitrust regulators at formation, such a broad extension of the single-entity doctrine would invite competitors to collude free from Section 1 scrutiny even when their conduct produces nothing more than reduced output and higher prices for consumers.[13]

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12. Lower courts have condemned joint venture activity under Section 1 even when the conduct at issue was engaged in years after the venture was formed. *See e.g.*, *United States v. Visa U.S.A. Inc.*, 344 F.3d 229 (2d Cir. 2003), *cert denied*, 125 S. Ct. 45 (2004) (condemning payment card association rules that precluded members from issuing cards offered by competitors). And others have noted that Section 1 is applicable even when the joint venture restraint was only directed at the activities of the joint venture participants. *See e.g.*, *Polygram Holding, Inc. v. FTC*, 416 F.3d 29, 37 (D.C. Cir. 2005) (holding that policy precluding partners from advertising discounts violated Section 1 because "[a]n agreement between joint venturers to restrain price cutting and advertising with respect to products not part of the joint venture looks suspiciously like a naked price fixing agreement between competitors. . . ."); *Augusta News Co. v. Hudson News Co.*, 269 F.3d 41, 48-49 (1st Cir. 2001) (noting that agreements to allocate territories among joint venture participants were "subject to antitrust attack under" Section 1).

13. Under 16 C.F.R. Sect. 801.40, a contributor to a joint venture is required to file notification under the HSR Act only if it satisfies the commerce and size-of-transaction tests under Section 7A of the Clayton Act. The HSR also could permit the consummation of potentially anticompetitive joint ventures with little or no scrutiny. As an example, A, an electronics manufacturer with $110 million in

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Moreover, as this case shows, even when joint ventures are scrutinized by regulators, the nature of the claimed integration, or the extent to which it impacts actual or potential competition between the participants, requires continuing Section 1 scrutiny after formation.[14] Here, *ex ante*, the joint venture may have superficially resembled a partial merger. *Ex post*, however, it looks like a temporary three-year suspension of competition, which may have facilitated price-fixing in markets outside the joint venture.

According to Visa and its co-*amici*, their proposed standard would not create "an unduly broad safe harbor for joint ventures" because Section 1 still would apply post-formation "to restraints on conduct outside the scope of the integration where the participants remain actual or potential

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sales, B, an office supply wholesaler with $90 million in assets, and C, an office supply manufacturer with $195 million in sales, form a joint venture with assets of $95 million to develop new marketing techniques for office supplies. A and B both acquire voting securities in the joint venture, while C receives nonvoting convertible securities. In this formation, only A would have to file notification (if it acquired voting securities valued in excess of $50 million) even though any competitive harm from the transaction would reside in the combination of B and C. B would be exempt because it does not satisfy applicable jurisdictional thresholds, and C's acquisition of nonvoting convertible securities would be exempt.

14. Notably, in their recent guidelines on competitor collaborations, the federal antitrust agencies avoided endorsing safe harbors, except in limited circumstances. *See* Federal Trade Commission & Department of Justice Antitrust Division, *Antitrust Guidelines for Collaborations Among Competitors*, 4 Trade Reg. Rep. (CCH) ¶ 13 (2000) ("*Guidelines*"). According to the agencies, Section 1 should reach joint venture activity except when the participants' market shares fail to reach specified thresholds or when at least four viable entities, including the joint venture, compete in an "innovation market." *Id.* at Section 4.

competitors, or where a restraint impacts competition between the venture and its participants *qua* owners." Visa Br. at 5. But this proposed limitation to Visa's safe harbor likely would not reach a situation in which the setting of the price of the joint venture's products indirectly facilitated price-fixing in related markets. In such situations, defendants will undoubtedly contend, as petitioners said here, that the restraint merely affected the price of the venture's products. And a broad safe harbor rule likely would permit their cartel activity to escape scrutiny. For these reasons, extending *Copperweld* to create a broad safe harbor for joint venture conduct post-formation would eliminate the protective shield Section 1 provides against anticompetitive joint venture conduct.

A broad safe harbor also cannot be squared with the antitrust principle that *per se* rules should be limited to restraints with predictable effects. It is hard to imagine an area of antitrust law less suited to an expansive formalistic *per se* rule than joint ventures. Such arrangements come in different forms, with varying purposes, efficiencies and potential anticompetitive effects. This is readily apparent from a comparison of Visa to the venture created by Texaco and Shell. Visa is a "consortium[] of competitor[] [banks] . . . which compete with one another in the issuance of payment cards and the acquiring of merchants' transactions." *United States v. Visa U.S.A. Inc.*, 344 F.3d 229, 242 (2d Cir. 2003), *cert denied*, 125 S. Ct. 45 (2004).[15] Visa itself admits that it "differs in many respects from the joint venture at

15. The Second Circuit further held that this consortium of competitors "set[s] the policies of Visa U.S.A.," and when those policies restrain competition between Visa's owner/members, they are the "exemplars of the type of anticompetitive behavior prohibited by the Sherman Act." *Id.* Visa has twice been found to have unlawfully exercised its substantial market power. *Id.* at 239-43; *In re Visa Check/MasterMoney Antitrust Litig.*, No. 96-CV-5238, 2003 WL 1712568 (E.D.N.Y. April 1, 2003).

issue here." Visa Br. at 1. Sound antitrust policy demands that the antitrust treatment of such plainly disparate corporate forms be evaluated on a case-by-case basis, with an "enquiry meet for the case, looking to the circumstances, details, and logic of a restraint." *California Dental Ass'n*, 526 U.S. at 781. *See also Broadcast Music*, 441 U.S. at 8 (holding that, in antitrust law, "easy labels do not always supply ready answers.").

The Visa joint venture also highlights another danger in creating a safe harbor for joint venture conduct post-formation. Joint venture restraints that may have been necessary to the arrangement at formation can sometimes be transformed over time into naked restraints of trade. The defenders of fixed interchange sometimes argue that interchange fees were necessary to equilibrate the functions of the Visa (or MasterCard) payment networks at inception.[16] Even if that were true (and we would contest that it is), Visa (and MasterCard) interchange fees have mutated over time into nothing more than blatant exercises of market power. In other words, even though these fees are no longer necessary to the functioning of these networks, they continue to increase at enormous cost to merchants and consumers.

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16. The concept, which was accepted by the Eleventh Circuit in *National Bancard Corp. ("NaBanco") v. Visa U.S.A., Inc.*, 779 F.2d 592 (11th Cir. 1986), is that payment networks need both issuing banks (that issue card to cardholders) and acquiring banks (that sign up merchants) to function. If one side of the market bears a disproportionate share of the costs, it will need some reimbursement mechanism to have sufficient incentives to participate. The *NaBanco* court accepted the counterfactual argument that issuing banks, because of the costs they bear, needed such reimbursement in the form of interchange fees. *NaBanco*, 779 F.2d at 602-03, 605. Even if that argument made sense in the mid-1980s, it almost certainly had no validity by 1990.

At inception, the interchange fees fixed by Visa and MasterCard only applied to their credit card transactions. Since that time, Visa and MasterCard have extended their interchange price-fixing to signature debit card and commercial card transactions, and this tax on American merchants and consumers has increased exponentially. In 1971, when Visa introduced uniform interchange fees, U.S. merchants paid approximately $195 million in interchange.[17] In 1994, total Visa and MasterCard interchange fees paid by these merchants approximated $5.1 billion, and by 2004, total interchange fees paid approximated $26.5 billion.[18]

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17. *NaBanco*, 779 F.2d at 595; David S. Evans and Richard Schmalensee, *Paying With Plastic*, at 154 (2d ed. 2005); Visa U.S.A. Statistics & Reports, Payment Statistics – Volume, *at* http://www.usa.visa.com/about_visa/newsroom/statistics/volume.html?it=l2|/about_visa/newsroom/statistics/index%2Ehtml|Payment%20Statistics%20-%20Volume.

18. *See The Nilson Report*, Issues 591 (Mar. 1995), 833 (May 1995). Since 1990, Visa and MasterCard have intensified their exploitation of their power to cartelize their owner/member banks to fix interchange prices. In that time frame, Visa/MasterCard credit card interchange fees for the vast majority of non-supermarkets have increased 8-10 times (8 for Visa; 10 for MasterCard), totaling at least a 50-64 percent increase (50% for MasterCard; 64% for Visa). Also, since 1993, Visa/MasterCard credit card interchange fee rates for the vast majority of supermarkets have increased 6 times, totaling at least a 37-56 percent increase (37% for Visa; 56% for MasterCard). *See, e.g.*, *The Nilson Report*, Issues 758 (Feb. 2002), 765 (June 2002), and 793 (Aug. 2003); Credit Card Management, *Visa Tinkers with Credit Interchange* (Aug. 2003). During this time frame, the costs of issuing credit cards — the reimbursement of which is the purported justification for interchange — have declined substantially. *See NaBanco*, 779 F.2d at 605 (collective setting of credit card interchange lawful because court found (erroneously) that without guaranteed reimbursement of issuer costs, credit card issuers would not have incentives to participate in the Visa system).

V. THIS DECISION SHOULD BE LIMITED TO THE QUESTION PRESENTED

We address the implications of Visa's argument not to litigate the merchants' case against Visa's interchange price-fixing at this time, but rather to emphasize the pitfalls of deciding issues that need not be addressed on this appeal. Visa betrays its agenda — an expanded single entity doctrine that could immunize interchange from antitrust scrutiny — in a footnote that contends that Section 1 should not reach the functions of a network that produces "inherently interdependent" products because network conduct "by definition, do[es] not eliminate competition between the venturers that would exist but for the creation of the venture." Visa Br. at 15 n.9 (emphasis omitted).[19] Visa does not explain how a court could distinguish a pure "network function" from restraints that affect (and perhaps subvert) competition outside the venture without engaging in some form of Section 1 analysis. Absent Section 1 scrutiny, courts would be unable to make those critical distinctions. Whatever the case, because Visa's argument is far afield from the question presented on this appeal, it need not (and should not) be considered.[20]

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19. In making this argument, Visa neglects to mention *NaBanco* — the case it invariably cites to defend the collective setting of interchange — because that case applied Section 1 to interchange. While we disagree with *NaBanco's* ultimate ruling, the *NaBanco* court was correct in one respect: interchange should be scrutinized under Section 1.

20. Rule 14.1(a) of the Supreme Court Rules provides that "[o]nly the questions set out in the petition, or fairly included therein, will be considered by the Court." Although "[t]he statement of any question presented is deemed to comprise every subsidiary question," *id*, questions that are merely "related" or "complementary" to the question presented are not "fairly included therein." *Yee v. Escondido*, 503 U.S. 519, 537 (1992) (emphasis omitted); *Izumi Seimitsu Kogyo*

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CONCLUSION

For the foregoing reasons, this Court should decline to adopt a rule that automatically confers single-entity treatment to joint ventures or creates broad safe harbors for their conduct post-formation.

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Respectfully submitted,

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Kabushiki Kaisha v. U.S. Philips Corp., 510 U.S. 27, 31-32 and n.5 (1993) (*per curiam*) ("[T]he fact that Izumi discussed this issue in the text of its petition for certiorari does not bring it before us. Rule 14.1(a) requires that a subsidiary question be fairly included in the *question presented* for our review.") (emphasis in original).